112-613

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 114.

EMELINE S. WHITNEY, et al.
Plaintiffs in Error,

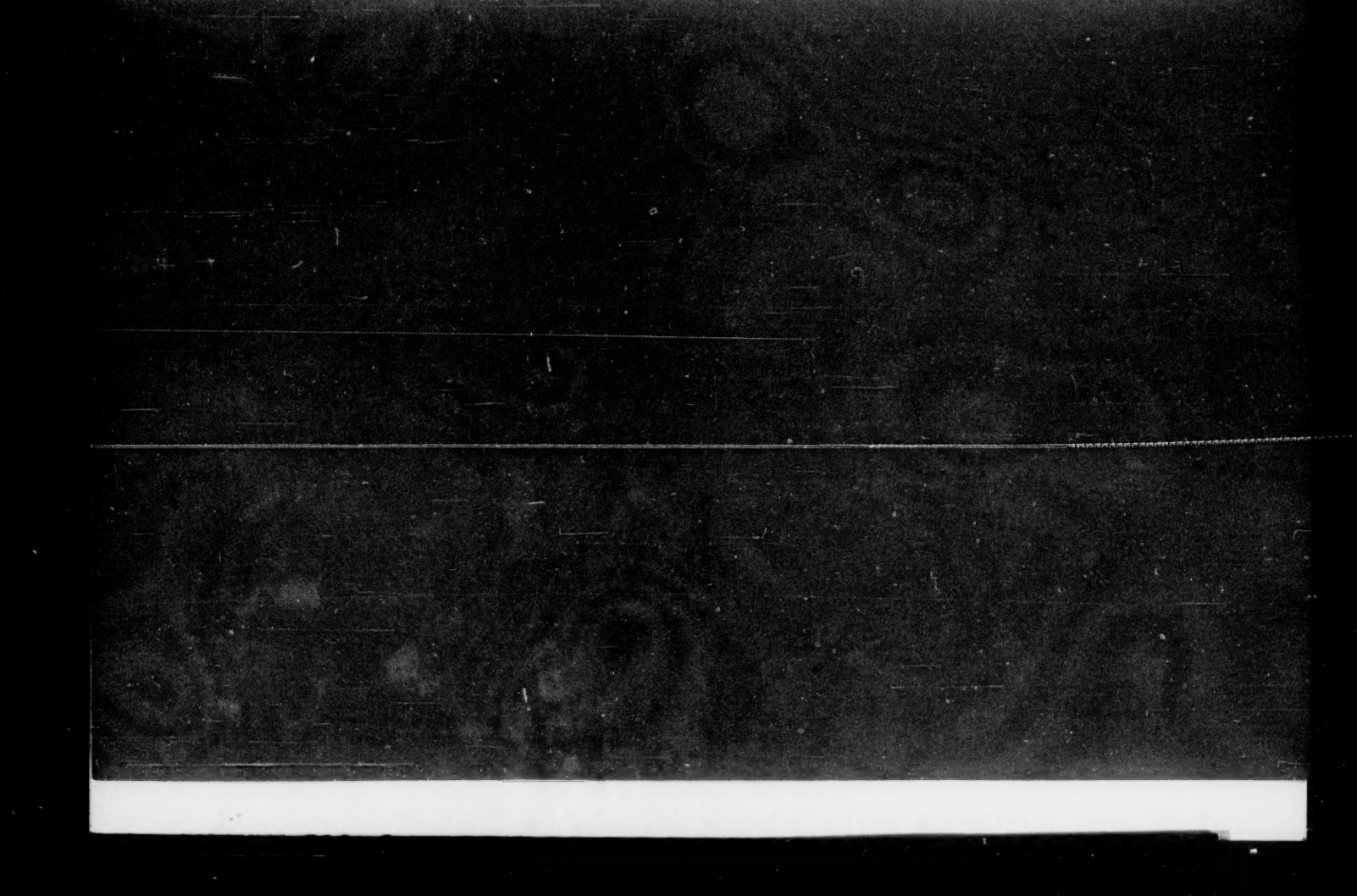
vs.

ELISHA MORROW,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

ENOCH TOTTEN,
for Plaintiffs in Error.

WASHINGTON, D. C.:
R. O. POLKINHORN & SON, PRINTERS,
1884.



In the Supreme Court of the United States.

OCTOBER TERM, 1884.

EMELINE S. WHITNEY ET AL.,
Plaintiffs in Error,

vs.

ELISHA MORROW,
Defendant in Error.

No. 114.

Brief for Plaintiffs in Error.

This cause comes here on a writ of error to the Supreme Court of the State of Wisconsin.

Statement of the Case.

The plaintiffs instituted this action to recover possession of a tract of land in the borough of Fort Howard, in Brown County, Wisconsin. They allege that they are seized in fee, of the property in question, and that the defendant unlawfully withholds, and ever since the 2d of June, 1870, has unlawfully withheld the same from them.

The defendant denies generally the allegations in the complaint, and also sets up an adverse and continuous possession, in good faith, of more than forty

years, under a claim of title based upon "a written instrument as being a conveyance" of the premises, and also, that he has made valuable improvements.

The cause was tried with a jury, and the trial resulted in a verdict, under the directions of the Court, in favor of the defendant. A bill of exceptions was signed and sealed. An appeal was prosecuted to the Supreme Court of the State of Wisconsin, where the judgment was affirmed. A writ of error was then sued out, and the case brought here.

On the trial the plaintiffs introduced in evidence a Patent, bearing date June 2d, 1870, issued by the United States to Pierre Grignon, covering the lands in dispute. (R. 8.)

The plaintiffs next introduced evidence of Peter B. Grignon, which, by consent of parties, was read from the report of a former trial, to show the relationship of Augustine Grignon, Charles Grignon, Paul Grignon, Louis Grignon, Amable Grignon, Domitille Brunette, Peter B. Grignon, Robert Grignon, Louis Grignon (son of J. B. Grignon, deceased, son of P. Grignon, patentee,) Josette Rio, Sophia Fontaine and Angelique Lamerand, all of whom claim to be heirs of the patentee.

The plaintiffs next introduced sundry deeds from the above named parties, claiming title, under Pierre Grignon, to the plaintiff Baker and Daniel Whitney; also a deed from the administrator of Augustine Grignon to the plaintiff, Emeline S. Whitney, of his interest in the premises; also the last will

and testament of Daniel Whitney, by which he devised all his estates, wherever situated and by whatever title held, to the plaintiff Emeline S. Whitney.

Defendant admitted that he was in possession of the premises at the commencement of this suit, and plaintiffs rested.

Defendant thereupon offered in evidence sundry deeds, tracing title from Alexis Gardapier and wife to the defendant, of the north two-thirds of the north half of his claim to a vacant strip, three arpents wide, confirmed to him by commissioners appointed to settle land claims, under the act of Congress of February 21, 1823.

The plaintiffs objected to the introduction of this evidence, because no title had been shown in Alexis Gardapier, under whom defendant claims. The Court overruled the objection of plaintiffs, to which ruling they accepted, and the deeds were admitted in evidence.

The defendant next offered in evidence entries in *Vol.* 4 *Am. State Papers* (*pages* 721 *and* 722), relating to the respective claims of Gardapier and Grignon, and then rested.

The plaintiffs then proved by parol that M. L. Martin, as attorney for Thomas Emerson, of the State of Vermont, had control and management of the north half of Gardapier's claim, from May, 1827, to June or July, 1828, when he sold to Arndt, and that there were no improvements upon it of any description during that time. (9.)

The plaintiffs then offered to prove by the witness that the line then claimed as the north line of the "vacant strip" was located by the parties claiming control of the various claims, and so continued until 1846, and that from 1827 to 1846, the land known and spoken of "as vacant strip" was claimed and occupied as a strip only three arpents in width, bounded south by private claim No. two, and that no other location was made until after 1846, when, by an official survey of lot one, under direction of the proper officer of the Government, the southern boundary of lot one was moved north between two and three arpents.

Thistestimony so offered by the plaintiffs was ruled out by the court, and an exception noted.

The plaintiffs then produced and offered in evidence a patent issued by the President of the United States to Alexis Gardapier, for a tract of land called "vacant strip," on the west side of Fox River, being the same confirmation referred to in *Vol.* 4 *Am. St. Papers*, introduced by the defendant.

The counsel for plaintiffs offered this patent in connection with testimony already offered, to identify what was considered the Gardapier tract, and to show that it covered no part of the premises claimed by plaintiffs. The defendant objected and the court sustained the objection and plaintiffs excepted to the ruling.

The defendant's counsel thereupon asked the court

to direct the jury to bring in a verdict for the defendants and the plaintiffs' counsel asked the court to direct a verdict for the plaintiffs.

The court refused the request made by plaintiffs' counsel, and directed the jury to render a verdict for defendant, which ruling was duly excepted to by plaintiffs.

No evidence was offered by the defendant in support of his defense based upon adverse and ancient possession, nor to establish his averments as to improvements put upon the land. Had he offered any it could have availed him nothing; the interest of the United States was not sufficiently divested, because the boundary lines were not sufficiently established, until the survey was made and the patent issued.

Assignment of Error.

First. The court erred in excluding the evidence offered, as set forth in the bill of exceptions (page 10), in behalf the plaintiff.

Second. In refusing the request of the plaintiffs' counsel to direct a verdict for the plaintiffs, and in directing a verdict for the defendant.

Argument and Authorities.

The plaintiffs insist that the question presented by this record is one exclusively of BOUNDARIES *of a tract of land, and that that question has been conclusively settled by the action of the Executive Department.*

A brief reference to the statutes and the acts of public officers in pursuance of their authority, is necessary to a proper understanding of the case.

By the treaty with Great Britain of 1794, commonly called Jay's treaty (8 Stat., 117), it was provided that the rights and property of all settlers within the precincts or jurisdiction of British military posts should be protected.

Soon after the evacuation of Detroit, in 1796, Congress took measures to comply with the obligations imposed by the Treaty, by passing laws providing for the grant to settlers, of titles to the lands occupied by them.

The act of 1807, (2 *Stat.*, 437,) authorized the appointment of commissioners to settle land claims in Michigan, and prescribed their powers and duties. They were to receive and allow certain claims, and to have them surveyed and returned for patent. This act provides that when it shall appear to the commissioners that a claimant is entitled to a tract of land, "they shall give a certificate thereof, stating * * * that the claimant is entitled to receive a patent for such tract," * * * * and that such tract shall be surveyed under the direction of the Surveyor general, and that the Surveyor general shall transmit to the register of the Land office, general and particular plats showing such survey," and that he shall also forward copies thereof to the Secretary of the Treasury. The act also provides that as soon as the plat shall have been transmitted to the register,

the claimant shall be entitled to receive from him a certificate directed to the Secretary of the Treasury upon which "patents shall issue in like manner as is provided by law, for other lands of the United States."

The act of 1820, (3 *Stat.*, 572), revived the powers and authority of the commissioners, and authorized them to pass upon claims at Green Bay, in the same manner as was provided in reference to claims in the district of Detroit. On the 4th of February, 1823, Grignon's claim was filed with the commissioners, in his name, by his heirs, based on a continuous possession of over sixty years. (See R., 16.) The act passed February 21, 1823, (3 *Stat.*, 724,) again revived the powers and authority of the commissioners, and authorized them to also consider the evidence and facts, to support the claims presented under the act of 1820. The 5th section of the act of 1823, provided that occupancy on July 1, 1812, should entitle a claimant to confirmation of his claim, and under this statute Alexis Gardapier claimed a vacant strip, *three arpents wide*, between lots one and two, basing his claim upon this section of the act.

The Pierre Grignon tracts, embracing all the land north of the first creek above Fort Howard, extending to the extreme north line of lot one, as afterwards located and including within its limits a part of lot two, the three arpents, claimed by Gardapier, and a part of the tract as originally claimed by Porlier, was recommended by the commissioners for confirmation. It is particularly described in his

claim presented to the commissioners, and confirmed by them as "lying and being on the west side of Fox river, Green Bay, immediately below the first creek that empties into said river, about fifteen acres in front on said river and extendingback in definitely." This claim was confirmed by the commissioners with the proviso added that it should not "interfere with a confirmation heretofore made to Jacques Porlier, or with a confirmation made by this board to Alexis Gardapier." (R., 9, 16; 4 Am. St., Papers, p. 721.)

The confirmation of the claim of Pierre Grignon was made on the first day of November 1823, and on the same day was confirmed a claim in favor of Alexis Gardapier, to a tract described "as being a vacant strip lying between tract number one, confirmed to Jacques Porlier, on the north, and tract number two, confirmed to Louis Grignon, on the south, commencing at low-water mark and running west eighty arpents, and in width *three arpents*, on the aforesaid River."

The following is a copy of the claim of Alexis Gardapier, as presented to the Commissioners under the act of 1823:

Entry of a tract of Land.

I, Alexis Gardapier, of the county of Brown and Territory of Michigan, do hereby enter my claim to a certain tract of land lying on the west bank of Fox River, and more particularly known as being a vacant strip lying between tract number *one*, confirmed to Jacques Porlier,

on the north, and tract number *two*, confirmed to Louis Grignon, on the south, commencing at low-water mark, and running west eighty arpents, and in width three arpents, on the aforesaid river. Witness my hand, at Green Bay, this 16th day of September, 1823.

his
ALEXIS × GARDAPIER.
mark

Witness: ROBERT IRWIN, JR.

In support of his pretentions, Gardapier filed with his claim, four affidavits, which are substantially alike, and go to establish the following facts:

> That about fifteen years before the claim was presented, (*i. e.* about 1808 or 1809,) one Joseph Roi, the father-in-law of Gardapier, surrendered to the latter all his property, real and personal, on condition that he should support Roi and his wife during their natural lives, and that Gardapier had done so; that among the property so surrendered was the tract mentioned and described in the above claim; that Gardapier had occupied and cultivated the tract from 1811 until 1817 or 1818, when he was driven out by the United States troops."

Upon this evidence the Commissioners made the following order of confirmation:

> DETROIT, *November* 1, 1823.
>
> On consideration of the preceding testimony, the Commissioners decide that the tract claimed be confirmed to Alexis Gardapier, provided that the same shall not interfere with any confirmation heretofore made." (See 4 Vol. Am. St. papers, Ed. of 1834, Duff Green, pp. 722 and 723; Vol. 5, Am. St. papers, Ed. of 1860, pp. 90, 91 and 92.)

These two confirmations were made by the commissioners on the same day, although Gardapier's claim was presented over seven months later than the other.

The act of Congress of April 17, 1828 (4 Stat., 260), confirms both of these claims as reported; it also provides (Sec. 4) that it shall be the duty of the Register of the Land Office at Detroit "to issue patent certificates in the forms used in similar cases, to claimants whose claims are confirmed by this act, upon which certificates, if legally and properly obtained, patents shall be granted by the Commissioner of the General Land Office." Substantially the same provisions, except less in detail, are contained in the fifth section of the act of 1823 (3 Stat., 725), which revived the original act of 1807. Each of these statutes contain provisions for the surveying of the several tracts of land confirmed to claimants.

By an act of Congress approved June 13, 1860 (12 Stat., 857), the title to the tract claimed by Pierre Grignon [as confirmed by the Commissioners] was again "ratified and confirmed," and the Commissioner of the General Land Office *was directed to cause the tract "to be surveyed in the same manner as other private claims to lands in Green Bay have been surveyed."* He was also "required to issue patents thereon" to and in the name of Pierre Grignon or to his representatives, "*according to the fifth section of said act of eighteen hundred and twenty-three;*" and afterwards, and on the second day of June, 1870, a patent covering the tract de-

scribed in the plaintiff's complaint and sought to be recovered in this action, was issued to Pierre Grignon by the Commissioner of the General Land Office.

In December 1866, a like act of Congress was passed (14 Stat., 615) again confirming the title of Alexis Gardapier to his tract, as confirmed by the same commission, and directing in nearly the same language, a like survey and patent therefor for the benefit of the heirs or assigns of Gardapier; and afterwards and in pursuance of the terms of this statute, a patent was, on the 2d day of June, 1870, duly issued to Alexis Gardapier, covering the vacant strip *three arpents in width*, between lots one and two, confirmed to him by the commissioners and by the act of Congress above mentioned. (R. 10.)

The defendant claims under Alexis Gardapier, whose rights were settled and boundaries fixed to the three arpents in width by this statute, the survey and the patent.

1. *The trial court erred in excluding the parol evidence offered by the plaintiffs.*

It is apparent from the record and the public documents, that, in reference to the three tracts involved in the inquiry here, there existed a confusion of boundaries. The report of confirmation by the Board of Commissioners plainly indicates this, and for that reason the commissioners doubtless added the proviso, in order that the question of quantities and boundaries should be settled in the

future by actual survey. If the three tracts by actual survey should be found sufficient to gratify the claims of Porlier, Gardapier and Grignon, then they were all to be satisfied; and it is certainly true that Gardapier's claim has been satisfied. The official survey and patent concludes this question.

The oral testimony, offered by the plaintiffs, and rejected by the court, would have shown that the line between Porlier's claim, (tract No. 1,) and the "vacant strip" south thereof, was, for many years, supposed to be two or three arpents farther south than Porlier's quantity would justify; and that in 1846, after, and in pursuance of an actual survey made by a deputy surveyor of the United States, this line was properly located. The plaintiffs also offered to prove that the land known and spoken of as the "vacant strip" was claimed to be, and occupied anciently, as a strip only three arpents in width, bounded on the south by claim number two, and that no other location was made until 1846, when the actual survey above mentioned was made. Parol proof was competent to establish this fact. (*Opdyke* vs. *Stephens*. 4 Dutch, 89; 3 Wash., on Real Prop., 349.) In excluding this evidence, the trial court committed an error. Such testimony would have shown that the distance between lots one and two as marked out and defined by actual survey, was much more than three arpents, and it would have made plain the exact situation of the parties laying claim to the various tracts, at the early date when such claims were first asserted. Neither

Grignon nor the other two claimants could well have been mistaken, then, as to the fact that, after taking out lot one, claimed by Porlier, more than *three arpents* in width (which was the whole quantity claimed by Gardapier) would have remained, and this would have been made plain by the parol proofs offered. This testimony would have shown also that the defendant was asserting titleto much more ground than he was entitled to claim as the representative of Gardapier. The latter was, by the statute granting it to him, limited to *three arpents* in width; the second section of the act of 1807 (2 Stat., 438), which was revived by the act of 1823, under which the Gardapier claim was presented and confirmed, provides distinctly that no more "than one tract or parcel of land" shall be "granted to any one person, and the same *shall not contain more than the quantity claimed.*" Now, it cannot be successfully argued in the face of the record, the act of Congress of 1866, the survey and patent issued in pursuance of both, that the Gardapier claim has not been fully gratified. It is submitted that the exclusion of this evidence was plainly wrong.

2. *The trial-court also erred in excluding the patent issued by the United States for the benefit of the heirs and assigns of Gardapier, in pursuance of the acts of Congress of* 1866 *and* 1823.

This was plainly proper and important evidence. It fixed the frontage of that tract on Fox River at

threearpents, and established the south boundary line of the Gardapier tract. It gave the starting point for the lines of that claim, and if it had not been suppressed by the defendant in the other trial, the present litigation would long ago have been ended. The plaintiffs were as much interested in this patent as was the defendant, and it was intended to and did operate with as much effect upon the title to their tract as upon any other. The confirmation by the commissioners in 1823, together with the confirmatory statute of 1828 and 1860, granted him a title to a tract of land, without definite or fixed limits. This patent, in connection with theirs, both based upon an actual survey, accurately fixed his boundaries, and thereupon the Grignon title, by virtue of the original confirmatory acts became perfect. The plaintiffs had the same right, undoubtedly, to demand that this patent should be issued by the officers of the Executive Department, as they had to demand the issue of their own, and its effect for their advantage and security was as powerful, if not of more importance. The acts of the commissioners and the acts of Congress, confirming them, were intended to operate for the benefit of the plaintiffs in some way. They were not mere idle ceremonies.

The boundary lines would have been settled by the two patents; the parol evidence offered by the plaintiffs would have fully explained the fact of the original confusion of lines. The description of the claim of Gardapier which, as originally given and

as set forth in the act of 1866, and, of course, in the patent, does not in any view of the language, give him *all* the vacant strip. I submit, that in the light of the limitations in the act of 1807, as to quantity, and of the evidence offered by the plaintiffs and rejected by the trial-court, the language cannot be so interpreted. The description calls for a tract known as a vacant strip "*lying between*" two specified tracts of land. The south line of Porlier's tract is not mentioned as its north boundary, nor is the north line of Louis Grignon's tract called for as a boundary. If it be true, as the plaintiffs offered to prove, that this "vacant strip" was known as being *three arpents* in width, and not more, and as extending north from the north line of tract number two that distance, the uncertainties would have been wholly removed, even if the patents are not conclusive. But the patent to Gardapier was issued in pursuance of law, and was the act of the Executive Department of the Government and should have been admitted in evidence. The fact that these two patents, for adjoining tracts, were issued on the same day (June 2, 1870,) is a very strong, if not an irresistible argument, to prove that the authorities of the Executive Department of the Government, having all the claims and surveys before them, considered the question whether or not there was sufficient land in the "vacant strip" to respond to the calls of both these parties, Porlier and Gardapier, and leave anything for Grignon, and that they decided that there was, and issued patents accordingly. These considera-

tions seem to be conclusive of the argument in favor of the competency and materiality of the Gardapier patent as evidence. It is submitted that both patents were alike material and competent as evidence, and that the court erred in excluding from the jury the consideration of the Gardapier patent.

The court should have directed the jury to render a verdict for the plaintiffs on the strength of the testimony adduced. The patent issued on the Grignon claim was conclusive in the case as it was presented. It was error to refuse to so direct the jury when asked to do so by plaintiff's counsel.

This cause was before this court in 1877 (95 U. S. 551), but it was presented in an entirely different aspect. The Gardapier patent seems to have been wholly overlooked at that trial and was probably suppressed by the defendant.

This court, in the opinion in that case, speaking upon the effect of a patent upon the defendant's claim, uses the following language:

> "In this case the patent would have been of great value to the claimant. It would have enabled him, without other proof, to maintain his title in the tribunals of the country. Founded, as it would have been, *upon a survey by the Government*, it would have *removed the doubt as to the boundaries* of the tract which always arises when their establishment rests in the uncertain recollection of witnesses as to ancient possessions."

It is true that this patent does remove the doubt as to the boundaries. It was probably for that reason that it was kept in the dark by the defendant.

It is submitted, as a sound proposition of law, that the execution of the various acts of Congress bearing upon the questions involved herein, devolved upon the officers of the Executive Department of the Government, and that their action is conclusive upon the courts.

Balance vs. *Forsyth*, 24 How. 183;
Morrow vs. *Whitney*, 95 U. S. 551;
Yount vs. *Howell*, 14 Cal. 470;
Polk's Lessee vs. *Wendell*, 9 Cr. 98;
Potter vs. *Winn*, 11 Wheat., 380.

Each of the statutes above mentioned, conveys the idea that a survey and patent shall be *necessary to complete the title;* in fact, each contains directions to that effect. In relation to the claim confirmed to Gardapier, when considered in connection with the Porlier claim and the order confirming Grignon's claim, it is apparent that such a survey was *indispensable.* In such cases, even without statutory requirements, no title passes by the grant to any particular tract. This Court has so held.

Gaines vs. *Nicholson*, 9 How., 356;
Ballance, vs. *Forsyth*, 13 " 18;
Meyer vs. *Greer*, McAllister, 401;
Willot vs. *Sanford*, 19 How., 79–82;

Baird's Lessee vs. *Wolfe*, 4 McLean, 549;
West vs. *Cochran*, 17 How., 415;
Minter vs. *Crommelin*, 118 How., 88;
Bagnell vs. *Broderick*, 13 Pet., 45.

The patent of the United States issued to Grignon (simultaneously with the patent to Gardapier) fixed his boundaries as follows:

> "Bounded on the north by private claim number one (1) confirmed to Jacques Polier, on the east by Fox River, on the south by *vacant strip, confirmed to Alexis Gardapier*, and on the west by lot No. one hundred and eleven (111) of Fort Howard Reservation, containing ninety-four (94) and 76-100 acres."—(See R., pp. 5 & 8,)

The act of Congress of 1807, revived by the acts of 1820 and 1823, constitute the foundation of the Gardapier grant, and must be strictly construed, at least as to the quantity of land granted. These various statutes are *in pari materia*, and together limit each claimant to "six hundred and forty acres;" they declare also, that no more than one tract of land shall be granted any one person, and that the "same *shall not contain more than the quantity claimed*." Gardapier presented his claim for a tract of land *three arpents* in width on Fox River, by eighty arpents in depth, and we assert and offered to prove that this quantity was all he ever pretended to claim. It was confirmed to him by the Board of Commissioners, and their report was con-

firmed by the acts of 1828 and 1866. This tract was subsequently surveyed and patented to him, and no one disputes the validity of the grant or the right of his representations to hold and enjoy it, and they do hold and enjoy it. The confirmation by the act of Congress of 1828, was coupled with a requirement amounting to a condition, that a survey should be made and a patent issued. This appears to have been neglected, and in 1866 another act of Congress directed that this requirement should be carried out, which was subsequently done. These various provisions and acts of the Executive department, in execution of them, inexorably fix the *frontage* and the *quantity* of the land granted to Gardapier. When the quantity of land is, either by conveyance or statutory grant, thus positively fixed, the words in the act of confirmation locating the tract, and describing it as "*lying between* lot numbered one" on the north, and "a tract number two" on the south, must yield to the words of limitation as to the quantity.

The familiar rule so often asserted and followed in actions of covenant and like actions, in cases where the quantity of land is mentioned and follows the description of the land by "known and visible monuments"—as in *Howe* vs. *Boss*, (2 Mass., 380), and in *Emery* vs. *Fowler*, (38 Me., 99), is not applicable to this case as now presented. The lines of the two tracts here called number *one* and number *two*, were not mentioned as "boundaries," and furthermore, the fact is, and the plaintiffs

were ready and offered to prove it, that at the time the south line of lot one was neither *known* nor *fixed*; it was supposed to be about three arpents farther south than the actual survey of 1846 established it. These parties, therefore, might well have been mistaken as to the location of this line in the absence of a survey; there is no evidence whatever that there was any monument, fixed or otherwise, to indicate the location of that line prior to the official survey of 1846. It seems reasonable to believe that they could not easily have fallen into an error in regard to so plain and steady a question as the distance of three arpents measuring along the bank of a large river.

Washburn, in his work on Real Property (vol. 3, p. 351), lays down the following rule:

> Where a certain quantity of land is mentioned, with a given side upon the river, without the courses being given, it was held that the tract should be laid out as nearly as might be in a rectangular form, in the direction indicated from the stream, the stream forming its base line, the two sides being parallel and drawn at right angles with the general course of the stream at that point, and to extend back far enough to include the requisite quantity. If the description does not require the side opposite the stream to be parallel with the stream, that side is to be drawn at right angles with the sides, and parallel with the general direction of the stream.

In the case before us no starting point on the river was originally given for the Gardapier tract,

unless the lines of the two lots were considered boundaries. This could not have been so, because, if they had been so taken, the confirmation to Grignon and the confirmatory statutes thereof, could have no effect or operation whatsoever, and two claims, instead of three, would be effectual. Such a construction of a statute, or conveyance is not allowable. The parol evidence offered by the plaintiffs would have shown that the ~~south~~ north line of lot *one* had not been ascertained or located prior to 1846: hence, the reasonable intendment of the persons who used the language must have been to take for a starting point, the junction of the ~~south~~ north line of lot *two* with the river.

This is precisely what the Commissioner of the General Land Office has done, and under the circumstances no other course could have been reasonably pursued. His action, as a matter of fair dealing, ought to be sustained.

It may be suggested in conclusion, that in considering the equities between these parties, it is material to remember that Grignon's original claim, when presented to the Board of Commissioners in 1823, was based on a possession of sixty years, while that of Gardapier was based upon less than nine.

It is therefore submitted that the judgment of the Supreme Court of Wisconsin should be reversed, and that the cause should be remanded with directions to award a new trial.

ENOCH TOTTEN,
For Plaintiffs in Error.

112-711

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. ~~879.~~ 517

LAZARUS SCHARFF AND A. SCHARFF, PLAINTIFFS IN ERROR,

vs.

JAMES LEVY AND ALBERT LEVY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JUNE 6, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 879.

LAZARUS SCHARFF AND A. SCHARFF, PLAINTIFFS IN ERROR,

vs.

JAMES LEVY AND ALBERT LEVY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 The United States of America to James Levy and Albert Levy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first day of June next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the eastern district of Missouri, wherein Lazarus Scharff and A. Scharff are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the district court of the United States for the eastern district of Missouri, this fourth day of May, in the year of our Lord one thousand eight hundred and eighty-three.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

1*a* We hereby acknowledge service of the within citation for said defendants in error, at St. Louis, Missouri, on this the seventh day of May, A. D. 1883.

DYER, LEE & ELLIS,
Att'ys for Def'ts in Error.

Endorsed: No. 2186. United States circuit court, eastern district of Missouri. James Levy *et al. vs.* Lazarus Scharff *et al.* Citation. Filed May 4, 1883. A. P. Selby, clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the March term, 1883, thereof, between James Levy and Albert Levy, plaintiffs, and Lazarus Scharff and A. Scharff, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first day of June next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that

error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fourth day of May, in the year of our Lord one thousand eight hundred and eighty-three.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.] A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri.

Allowed by—
SAMUEL TREAT, *Judge.*

2a *Return to Writ.*

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court, at office, in the city of St. Louis, this 22d day of May, A. D. 1883.

[SEAL.] A. P. SELBY,
Clerk of said Court.

Endorsed: No. 2186. United States circuit court, eastern district of Missouri. James Levy *et al. vs.* Lazarus Scharff *et al.* Writ of error. To the circuit court of the U. S., eastern district of Missouri. Returned and filed, —— day of ———, 188–. ———, clerk.

3 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States, in and for said District.

Be it remembered that on the 30th day of March, A. D. 1883, the following, among other proceedings, were had and appear of record in said court, to wit:

JAMES LEVY *et al.*, Plaintiffs, }
vs. } No. 2186.
LAZARUS SCHARFF *et al.*, Defendants. }

Now come defendants, by Messrs. Noble and Orrick, their attorneys, and file transcript from the St. Louis circuit court, and enter appearance herein.

Transcript from St. Louis Circuit Court.

Said transcript is in words and figures following, to wit:

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that heretofore, to wit, on the 18th day of

November, 1882, there was filed in the office of the clerk of the circuit court, city of St. Louis, a petition, wherein James Levy and Albert Levy are plaintiffs and Lazarus Scharff and Adolphus Scharff are defendants.

And on the same day a summons issued directed to the sheriff of the city of St. Louis; which petition and summons, together with the sheriff's return thereon, are in words and figures following, to wit:

Petition.

STATE OF MISSOURI, } ss:
City of St. Louis, }

In the Circuit Court, City of St. Louis. December Term, 1882.

JAMES LEVY and ALBERT LEVY, Plaintiffs,
vs.
LAZARUS SCHARFF and ADOLPHUS SCHARFF, Defendants.

4 Plaintiffs state that at the date of the transactions hereinafter set forth, they were and now are copartners doing business in the city of Cincinnati, State of Ohio, under the firm name and style of "James Levy & Bro.," and that during said time the defendants were copartners in trade, doing business under the firm name of "L. & A. Scharff."

For their cause of action herein plaintiffs state that heretofore, to wit, on the 17th day of February, 1881, the planitiffs and defendants, under their respective firm names as aforesaid, entered into a contract, which is herewith filed and marked "Exhibit A," by the terms of which said contract the defendants purchased from the plaintiffs one thousand barrels of whiskey, to be thereafter manufactured by plaintiffs, and to consist of the brands and inspection hereinafter mentioned, and to be delivered at the dates and for the prices hereinafter set forth, to wit: That 250 barrels of said whiskey, by the terms of said contract, was to be of the brand known as the "W. H. McBrayer" whiskey, of which fifty barrels thereof was to be of the "Fall, 1881," inspection, and the balance thereof, to wit, 200 barrels, was to be of the "Spring, 1882," inspection, to be delivered to the defendants as follows, to wit: 25 barrels thereof in October, 1881, 25 barrels thereof in November, 1881, 40 barrels thereof in January, 1882, 40 barrels thereof in February, 1882, 40 barrels thereof in March, 1882, 40 barrels thereof in April, 1882, and 40 barrels thereof in May, 1882; that all of said whiskey of said brand, by the terms of said contract, was to be paid for by defendants at the following rates and terms, to wit, at 70 cents for each proof gallon, original gauge in bond, from the date of each invoice, and upon delivery to the defendants of the warehouse receipts and United States gauger's certificate of the original gauge thereof. That 250
5 barrels of said whiskey, by the terms of said contract, was to be of the brand known as the "T. B. Ripey" whiskey, of which 75 barrels thereof was to be of the "Fall, 1881," inspection, and the balance of said brand was to be of the "Spring, 1882," inspection, and all of said brand of whiskey was to be delivered to the defend-

ants at the following dates, to wit: 25 barrels thereof in September, 1881, 25 barrels thereof in October, 1881, 25 barrels thereof in November, 1881, 25 barrels thereof in January, 1882, 25 barrels thereof in February, 1882, 25 barrels in March, 1882, 50 barrels thereof in April, 1882, 25 barrels thereof in May, 1882, and 25 barrels thereof in June, 1882; that all of said whiskey of said brand, by the terms of said contract, was to be paid for by the defendants at the following rates upon the following terms, to wit, at 60 cents for each proof gallon, original gauge in bond, in four months from the date of each invoice, and upon delivery of warehouse receipt and United States gauger's certificate of original gauge thereof. That 200 barrels of said whiskey, by the terms of said contract, was to be of the brand known as the "T. W. Samuels" whiskey, all of which was to be of the "Spring, 1882," inspection, and all of said brand of whiskey was to be delivered to defendants at the following dates and in the following quantities in the year 1882, to wit, at 57½ cents for each proof gallon, original gauge in bond from the date of each invoice, and upon the delivery to defendants of warehouse receipts and United States gauger's certificate of original gauge thereof. That 150 barrels of said whiskey, by the terms of said contract, was to be of the brand known as "Mellwood" whiskey, all of which was to be of the "Spring, 1882," inspection, and all of said brands of whiskey were to be delivered to the defendants in the following quantities in the following months in the year 1882, to wit:
6 50 barrels thereof in each of the months of March, April and May of said year, and was to be paid for by said defendants at the following rates and upon the following terms, to wit, at 40 cents for each proof gallon original gauge in bond, from the date of each invoice and upon delivery to the defendants of warehouse receipts and United States gauger's certificate of original gauge thereof. That 50 barrels of said whiskey, by the terms of said contract, was to be of the brand known as "W. S. Stone" whiskey, and was to be of the "Spring, 1882," inspection, and was to be delivered to the defendants in the following quantities in the following months of the year 1882, to wit: 25 barrels in each of the months of April and May of said year, and to be paid for by the terms of the contract at the following rates, and upon the following terms, to wit, at 50 cents for each proof gallon, original gauge in bond, four months from date of each invoice upon delivery of warehouse receipts and United States *gauger's* certificate thereof. That 100 barrels of said whiskey, by the terms of said contract, was to be of the brand known as the "J. B. Wather & Bro." whiskey, to be of the "Spring, 1882," inspection, and to be delivered to the defendants in the following quantities and in the following months in the year 1882, to wit: 50 barrels in the month of April and 50 barrels in the month of May of said year, and was to be paid for by said defendants at the following rates and upon the following terms, to wit, at 37½ cents for each proof gallon, original gauge in bond, four months from date of each invoice, and upon the delivery to the defendants of warehouse receipts and United States *gauger's* certificate of original *gauge* thereof.

Plaintiffs further allege that in and by the terms of said contract it is provided that the storage on said whiskey shall be charged at
7 the rate of five cents per barrel per month and fraction thereof from the date of entry thereof into a United States bonded warehouse, and that it is further provided in said contract that if from fire or other casualty the plaintiffs should be unable to comply with the terms of said contract in full or in part, that then and in such case the plaintiffs should not in any way be held liable for such non-fulfillment of said contract.

Plaintiffs further allege that they manufactured and tendered to the defendants, in accordance with the terms of said contract, all of said brands of whiskey called for thereby and the quantities of said several brands as called for by said contract, excepting in this, that in the month, of September, 1881, by reason of the great drouth that had existed in that part of the country where the said T. B. Ripey brand of whiskey was made, no water could be procured for the purpose of manufacturing the same, and plaintiffs were unable to manufacture or deliver to the defendants said 25 barrels of whiskey of said brand, which, by the terms of said contract, they were to deliver in the month of September, 1881, but that they then and there offered to deliver to the defendants at the same price as is specified in said contract for said brand of whiskey in said month of September, 1881, 25 barrels of said brand of whiskey manufactured and inspected in the month of July, 1881, or the same quantity and brand at the same price made and inspected in the month of October, 1881, and that said 25 barrels of whiskey so tendered to the defendants of the inspection of "July, 1881," was superior in quality and of greater value than the same quantity and brand of whiskey which, by the terms of said contract, was due defendants in said month of September, 1881, and also with the further exception that
8 the 50 barrels of whiskey of the brand T. W. Samuels, which, by the terms of said contract, was to be delivered to the defendants in the month of May, 1882, was not delivered by plaintiffs to defendants during said month by reason of the destruction of said T. W. Samuels' distillery by fire, and in said month of May, 1882, plaintiffs tendered to said defendants, at the contract price for said brand, 50 barrels of said brand of whiskey of an elder, better quality, and of greater value than was called for by the terms of said contract to be delivered in said month.

Plaintiffs further allege that on the 20th day of October, 1881, which was the date of the invoice thereof, they tendered to the defendants, in accordance with the terms of said contract, 25 barrels of the inspection of the "Fall, 1881," of the brand "W. H. McBrayer" whiskey, containing $1,144\frac{28}{100}$ proof gallons of said whiskey; that on the 20th day of October, which is the date of the invoice thereof, they tendered to the defendants, in accordance with the terms of said contract 25 barrels of the "Fall, 1881," inspection of the "T. B. Ripey" brand of whiskey, containing $1,131\frac{65}{100}$ proof gallons of whiskey, and that on the 17th day of November, 1881, which is the date of the invoice thereof, they tendered to the defendants in accordance with the terms of said contract, 25 barrels of the "T. B.

Ripey" brand of whiskey, of the inspection of the "Fall, 1881," containing 1,143 $\frac{76}{100}$ proof gallons; that on November 17th, 1881, which is the date of the invoice thereof, they tendered to the defendants, in accordance with the terms of said contract, 25 barrels of "W. H. McBrayer" brand of whiskey, of the inspection of the "Fall, 1881," and containing 1,144 $\frac{76}{100}$ proof gallons; that on the 24th of January, 1882, being the date of the invoice thereof, they tendered to the defendants 40 barrels of said "McBrayer" brand of whiskey,
of the "Spring, 1882," inspection, containing 1,816 $\frac{88}{100}$ proof
9 gallons; that on January 24th, the date of the invoice thereof,
they tendered to the defendants 25 barrels of the "T. B. Ripey" brand of whiskey, of the spring inspection of 1882, containing 1,140 $\frac{23}{100}$ proof gallons; that on February 23d, 1882, the date of the invoice thereof, they tendered to the defendants 25 barrels of said "Ripey" brand of whiskey, of the "Spring, 1882," inspection, containing 1,140 $\frac{74}{100}$ proof gallons; that on the 23d day of February, 1882, the day of the invoice thereof, they tendered to the defendants, in accordance with the terms of said contract, 50 barrels "T. W. Samuels" brand of whiskey, of the inspection of the "Spring, 1882," containing 2,302 $\frac{15}{100}$ proof gallons; and that on the 23d day of February, 1882, the date of the invoice thereof, they delivered to the defendants, in accordance with the terms of said contract, 40 barrels of said "McBrayer" brand of whiskey, of the inspection of "Spring, 1882," containing 1,802 $\frac{74}{100}$ proof gallons; that on the 23d day of March, 1882, the date of the invoice thereof, they tendered to the defendants, in accordance with the terms of said contract, 40 barrels of said "McBrayer" brand of whiskey, of said spring inspection, 1,807 $\frac{23}{100}$ proof gallons; that on March 23d, 1882, the date of the invoice thereof, they tendered to the defendants, in accordance with the terms of said contract, 50 barrels of said "Mellwood" brand of whiskey of said spring inspection, containing 2,225 $\frac{48}{100}$ proof gallons; that on March 23d, 1882, the date of the invoice thereof, they tendered to the defendants, in accordance with the terms of said contract, 50 barrels of said "Samuels" brand of whiskey, of said spring inspection, containing 2,294 $\frac{39}{100}$ proof gallons; that on March 23d, 1882, the date of the invoice, they tendered to the defendants 25 barrels of said "Ripey" brand of whiskey, of said spring inspection, containing 1,136 $\frac{18}{100}$ proof gallons; that on the 27 day of April, 1882, the date of the invoice thereof, they tendered to the defendants 50 barrels of said "Ripey" brand
of whiskey, of said spring inspection, containing 2,260 $\frac{23}{100}$ proof
10 gallons; that on the 27th day of April 1882, the date of the
invoice thereof, they tendered to the defendants 40 barrels of said "McBrayer" brand of whiskey, of said spring inspection, containing 1,810 $\frac{82}{100}$ proof gallons; that on the 27th day of April, 1882, the date of the invoice thereof, they tendered to the defendants 25 barrels of said "W. S. Stone" brand of whiskey, of said spring inspection, containing 1,093 $\frac{79}{100}$ proof gallons; that on said April 27th, the date of the invoice thereof, they tendered to the defendants 50 barrels of said "Mellwood" brand of whiskey of said spring inspection, containing 2,219 $\frac{96}{100}$ proof gallons; that on the 27th day of April, the date of the invoice thereof, they tendered to to the de-

fendants 50 barrels of said "Samuels" brand of whiskey, of said spring inspection, containing $2{,}278\frac{95}{100}$ proof gallons; that on said 27th day of April, 1882, the date of the invoice thereof, they tendered to the defendants 50 barrels of said "J. B. Wathen & Bro." brand of whiskey, of said spring inspection, containing $2{,}272\frac{89}{100}$ proof gallons; that on May 20th, 1882, the date of the invoice thereof, they tendered the defendants 50 barrels of "Wathen" brand of whiskey, of said spring inspection, containing $2{,}287\frac{1}{100}$ proof gallons; that on May 20th, 1882, the date of the invoice thereof, they tendered to the defendants 50 barrels of said "Mellwood" brand of whiskey, containing $2{,}285\frac{53}{100}$ proof gallons; that on said 20th day of May, the date of the invoice thereof, they tendered to the defendants 25 barrels of said "W. S. Stone" brand of whiskey, of said spring inspection, containing $1{,}181\frac{67}{100}$ proof gallons; that on June 14th, 1882, the date of the invoice, they tendered to the defendants 25 barrels of said "Ripey" brand of whiskey, of said spring inspection, containing $1{,}132\frac{63}{100}$ proof gallons.

11 And plaintiffs further allege that they have in all other respects complied with and performed their said contract, and that they have at all times been ready and willing to deliver said whiskies to the defendant, for whose account they hold the same, under the terms of said contract, but the defendants have refused to receive or pay for the same or any part thereof.

Wherefore plaintiffs pray judgment against the defendants for the purchase price of said whiskies so tendered to the defendants under the terms of said contract, to wit, for the sum of $23,530.45, together with interest thereon from the respective dates of the delivery thereof, as is alleged in said petition.

DYER, LEE & ELLIS,
Att'ys for Pl'ff't.

Summons.

CITY OF ST. LOUIS, } ss:
State of Missouri, }

To the sheriff of the city of St. Louis, Greeting:

We command you to summon Lazarus Scharff and Adolphus Scharff, to appear before the judges of our circuit court, on the first day of the next term thereof, to be held in the city of St. Louis, on the first Monday of December next, then and there to answer the complaint of James Levy and Albert Levy, as set forth in the annexed petition, and have you then and there this writ.

Witness Charles F. Vogel, clerk of our said court, with the seal thereof hereto affixed, at office, in the city of St. Louis, this 18th day of November, in the year of our Lord eighteen hundred and eighty-two.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

12 *Sheriff's Return.*

Executed this writ in the city of St. Louis, Mo., this 18th day of November, 1882, by delivering a copy of the writ and petition, as

furnished by the clerk, to Lazarus Scharff, one of the within named defendants.

And further executed this writ in said city, on the same date, by leaving a copy of the writ, as furnished by the clerk, at the usual place of abode of Adolphus Scharff, the other within named defendant, with a member of his family over the age of fifteen years.

ISAAC M. MASON, *Sheriff.*
By JOHN C. NIAL, *Deputy.*

Fees, $2.00.

And afterwards, at the December term 1882, of the circuit court, city of St. Louis, the following proceedings were had in said cause, to wit:

WEDNESDAY, *December 6th*, 1882.

Time granted defendants to plead.

JAMES LEVY *et al.*
vs. } No. 60364.
LAZARUS SCHARFF *et al.*

On motion of the defendants, by their attorney, it is ordered by the court that ten days' time be granted said defendant to plead herein.

Demurrer Filed.

SATURDAY, *December 30th*, 1881.

JAMES LEVY *et al. vs.* LAZARUS SCHARFF *et al.*

Demurrer filed.

And afterwards, at the February term, 1883, of said circuit court, the following further proceedings were had in said cause, to wit:

Demurrer Overruled.

WEDNESDAY, *February 14th*, 1883.

JAMES LEVY *et al.*
vs. } No. 60364.
LAZARUS SCHARFF *et al.*

Now at this day the court, being fully advised of and concerning the demurrer heretofore submitted to plaintiff's petition in
13 this cause, doth overrule said demurrer.

Continuance.

THURSDAY, *February 15th*, 1883.

JAMES LEVY *et al.*
vs. } No. 60364.
LAZARUS SCHARFF *et al.*

Continued by the court.

Answer Filed.

MONDAY, *March 5th*, 1883.

JAMES LEVY *et al.*
vs.
LAZARUS SCHARFF *et al.* } No. 60364.

Answer filed.

Which answer is in words and figures as follows, to wit:

Answer.

STATE OF MISSOURI, *City of St. Louis:*

JAMES LEVY and ALBERT LEVY, Plaintiffs,
vs.
LAZARUS SCHARFF & ADOLPHUS SCHARFF, Defendants. } No. 60364.

In the Circuit Court, City of St. Louis.

The defendants, Lazarus Scharff and Adolphus Scharff, come now and, by leave of court, file this their answer to plaintiffs' petition, and for answer say:

1. Defendants admit defendants were partners as alleged, and that plaintiffs were partners as alleged, and that a contract was made by and between the firms stated in the firm names, and that said contract was in form and substance the same as is by said petition set forth, but say that plaintiffs have not set forth many of the material provisions in said contract contained. Defendants deny that plaintiffs either manufactured or tendered to the defendants, in accordance with the terms of said contract, all or any of said several brands of whiskey, in the quantities of said several brands, as in and by said petition averred.

14 Defendants deny that a great drought had existed in the month of September, 1881, as alleged; and deny no water could be procured for the purpose of manufacturing as alleged; and deny plaintiffs were unable to manufacture or deliver to defendants twenty-five (25) barrels of whiskey of the "T. B. Ripey" brand, as alleged, or for the reasons alleged.

Defendants admit that plaintiffs did not deliver to defendants said twenty-five (25) barrels of whiskey of the "T. B. Ripey" brand, which, by the terms of said contract, they were to deliver in the month of September, 1881, and defendants deny plaintiffs offered to deliver to defendants twenty-five (25) other barrels in manner and form alleged in said petition, and defendants deny plaintiffs ever tendered any whiskey of the said inspection of July, 1881, or other in the manner and form pretended; and deny that the same was of the quality or value in said petition averred. Defendants admit that the plaintiffs did not deliver the fifty (50) barrels of the brand of "T. W. Samuels," which, by the terms of said contract, were to be delivered to defendants in the month of May, 1882, during said month, and defendants deny said last named amount was not delivered by reason of the destruction of the said distillery, as alleged,

or that said distillery was destroyed; and deny plaintiffs tendered defendant fifty (50) other barrels in kind, manner, and form stated in the petition; and defendants further deny that plaintiffs tendered twenty-five (25) barrels of "W. H. McBrayer" whiskey on the date alleged, or any day in October, 1881, or that said barrels contained the gallons of whiskey alleged.

And defendants deny each and every other of the alleged ten-
15 ders of whiskey at the dates alleged, or any date in said several months, when the same were, by the terms of said contract, deliverable as said tenders are in said petition avered, or that said barrels, so pretended to have been tendered, contained the gallons of whiskey alleged, or any part thereof, or that said pretended tenders, or either of them, were or was in accordance with the terms of said contract. And defendants deny plaintiffs have, in all respects, or any respect, complied with or performed the said contract, or have been ready or willing to deliver the whiskey as alleged; and defendants deny that plaintiffs are entitled to damages in the sum claimed, or any sum whatever.

2. And defendants, further answering, and for another and separate defense to said action, say, that defendants, at the time of the execution of said contract, were wholesale liquor dealers at St. Louis, Missouri, selling goods purchased of manufacturers, the plaintiffs and others, to different localities in the State of Missouri, and west and south, and that of the goods and whiskies mentioned in said contract some were more desirable for defendants to have in their said trade than others of said whiskeys, some being of a kind defendants could sell readily and realize a fair profit thereon, and others such that were more difficult to sell and on which defendants could realize no profit whatever, as plaintiffs well knew; that of the more desirable kinds were the "McBrayer" and "T. B. Ripey" brands, and of the least desirable were the "T. W. Samuels," "W. S. Stone," and "J. B. Wathen & Bro." brands, and that defendants did endeavor to purchase of the plaintiffs on the terms of said contract only said "McBrayer" and "Ripey" brands, and did not desire to purchase, but wished to avoid purchasing, said whiskeys of the brands of "T. W. Samuels," "W. S. Stone," and
16 "J. B. Wathen & Bro;" but plaintiffs desired to sell, and insisted on selling, all said brands together, or none of them, to the defendants; and plaintiffs refused to sell said first-named whiskies to defendants, unless defendants would also purchase the last-named and less desirable brands, and particularly its "Wathen" brand, in equal quantity; that is to say, if five hundred barrels of the first two brands, then five hundred barrels of the last-named brands must also be purchased in same contract; and thereupon said contract was made; and defendants aver that, by and between plaintiffs and defendants, the said contract was, and was intended to be, and is entire, and not several; and that said plaintiffs were bound to deliver all of said different brands, in quantities, and at times, and on terms in said contract set forth, or that defendants should not be required to receive or take any of said whiskeys of any of said brands.

And defendants say that plaintiffs did not perform the terms of said contract on their part to be performed, in this, that plaintiffs did not deliver to defendants said twenty-five (25) barrels of whiskey of the "T. B. Ripey" brand, which, by the terms of said contract, plaintiffs were to deliver in said month of September, 1881, but then and there, as to said whiskey, did make default, and defendants did then and there immediately, upon said failure, notify said plaintiffs that said contract was, by said default and failure of plaintiffs, violated on their part, and declared of no binding force by defendants, because of said failure, as well as for the fraud of plaintiffs, in procuring said contract; and defendants further say, that plaintiffs did not further perform said contract, according to the terms thereof, in that the plaintiffs did not deliver to the defendants said fifty (50) barrels of whiskey of the brand "T.
17 W. Samuels," which, by the terms of said contract, plaintiffs were to deliver, in the month of May, 1882, but then and there, as to said whiskey, did make default; and defendants did not have or receive of said plaintiffs any of said whiskeys, and so defendants say plaintiffs ought not to recover of defendants any amount whatever.

3. And defendants, further answering, and for another and separate defense to said action, say, that defendants were, at the time of the execution of said contract, wholesale liquor dealers, at St. Louis, Missouri, selling goods purchased of manufacturers, the plaintiffs and others, at different localities in the State of Missouri, and west and south, and that of the goods and whiskies mentioned in said contract, some were more desirable for defendants to have in their said trade than others of said whiskeys, some being of a kind defendants could sell readily and realize a fair profit thereon, and others such as were more difficult to sell and on which defendants could realize no profit whatever, as plaintiffs well knew; that of the more desirable kinds were the "McBrayer" and "T. B. Ripey" brands, and of the least desirable were the "T. W. Samuels," "W. S. Stone," and "J. B. Wathen & Bro." brands, and particularly the last named of said brands, and that defendants did endeavor to purchase of the plaintiffs, on the terms of said contract, only said "McBrayer" and "Ripey" brands, and did not desire to purchase, but wished to avoid purchasing, said whiskeys of the brands of "W. S. Stone," "T. W. Samuels," and "J. B. Wathen & Bro.," and particularly the last named; but plaintiffs desires to sell, and insisted on selling, all said brands together, or none of them, to defendants; and plaintiffs refused to sell said whiskeys to defendants, unless defendants would also purchase the last-named and less
18 desirable brands, and particularly its "Wathen" brand, in equal quantity; that is to say, if five hundred barrels of the first two brands named, or either of them, were purchased, then five hundred barrels of said last-named brands had to be taken, including among the nest some of said "J. B. Wathen & Bro." brand; and thereupon said contract was made; and defendants aver that, by and between the plaintiffs and defendants, the said contract was, and was intended and agreed to be, entire, and not several,

and that said plaintiffs were bound to deliver all of said different brands, in quanties, and at times, in said contract set forth, or that defendants should not be required to receive or take any of said whiskeys of any of said brands; and defendants further say in this behalf, that at the city of St. Louis, Louisville, Kentucky, Cincinnati, Ohio, Peoria, Illinois, and other cities in the West, and at the time of the negotiation about said contract, and the execution thereof, between the parties thereto, there were engaged in the same trade with defendants, other wholesale liquor dealers, the rivals of defendants, and competitors for the trade, in districts of country aforesaid, where the trade of defendants extended; and that defendants could, as plaintiffs well knew, afford to purchase, under said contract, said inferior and less desirable brands of whiskeys, the "T. W. Samuels," "W. S. Stone," and "J. B. Wathen & Bro.," and particularly the last-named as aforesaid, with only so much of said other superior and more desirable brands, the "McBrayer" and "T. B. Ripey," if, and on condition, that the rivals and competitors of defendants aforesaid should be required by plaintiff, in any sales to said dealers, to purchase said several brands of superior and inferior, in the same proportion and in the same way
19 as defendants, or not to be allowed to purchase any of said brands of plaintiffs. And defendants say if any of the other dealers in the said trade were treated in plaintiffs' contracts with them on better terms, as to proportion of said different brands sold by plaintiffs, defendants, as plaintiffs well knew, would greatly suffer and be injured thereby, in the re-sale of whiskeys to be purchased by said contract by defendants from plaintiffs, and that plaintiffs so knowing, to induce defendants to make and enter into said contract with plaintiffs in said petition mentioned, did falsely and fraudulently represent unto defendants that plaintiffs had not contracted, were not contracting, and would not contract, with other of said dealers as aforesaid, or any other or different terms, as to said different brands, better for said others, or either of them, than with said defendants, and had required, and would require, said others to purchase of said inferior brands, including said "J. B. Wathen & Bro.," in all cases, a number of barrels equal, in the contract, to the superior brands; and defendants did rely on said representations of plaintiffs and, induced thereby, did make and enter into said contract sued on in this action, and which said contract defendants would not have made, or been induced to make, but for said false and fraudulent representations of plaintiffs; and defendants say said representations of plaintiffs to defendants were false and fraudulent in this, that at the time of the negotiation of said contract sued on and the execution thereof, and at and about said time, both before and after, said plaintiffs did make and enter into contracts, severally, with other of said wholesale liquor dealers at St. Louis, and Louisville, Kentucky; at Cincinnati, Ohio; at Peoria, Illinois, and at other cities in the West, for the sale
20 to them of certain of said brands of whiskeys aforesaid, and on other and different terms better for said other dealers, and each of them, than with defendants, whereby plaintiffs sold,

and contracted to sell, to said other dealers, as aforesaid, more of said superior brands in proportion to said inferior brands in said contract with them than were in the contract sued on, and did not include said "J. B. Wathen & Bro." brand, and among the rest such sales as above complained of were made by plaintiffs to Simon & Co., of Louisville; Bonnie Brothers, of same place; Stracke & Cæsar, of St. Louis; H. and J. Schwabacher, of Peoria, Illinois; F. W. Hartman & Co., Milwaukee, Wisconsin; Frankel & Block, Louisville, Kentucky; Anthony Nulsen, Adler Distilling Company; Mette & Kanne, & Meyer Bros. & Co., of St. Louis, Missouri; of which said contracts with said other dealers defendants were then and there ignorant, and which plaintiffs concealed from defendants; and defendants say they were thereby, and by each of said other contracts and sales, greatly wronged and damaged, and said contract sued on became and is void, because of said other sales, and each of them, and of said false and fraudulent representations to defendants as aforesaid, and defendants, as soon as they learned of said fraudulent acts and other contracts made as aforesaid, and that said representations to defendants were false and fraudulent, as hereinabove shown, and before any of said whiskeys mentioned in said contract sued on were deliverable, notified the plaintiffs that said contract sued on was void and of no binding force on defendants, and defendants would not further regard or be bound thereby.

And defendants having fully answered ask to be dismissed with costs.

NOBLE & ORRICK,
Attorneys for Defen'ts.

21 And again, at the February term 1883, the following further proceedings were had in said cause, to wit:

Time Granted Plaintiffs to Plead.

THURSDAY, *March 8th*, 1883.

JAMES LEVY *et al.*)
vs.) 60364.
LAZARUS SCHARFF *et al.*)

On motion of the plaintiffs, by their attorney, it is ordered by the court that time to, and including the 19th day of March, 1883, be granted said plaintiffs to plead to, or move against the answer of the defendants herein.

Order of Removal.

WEDNESDAY, *March 14th*, 1883.

JAMES LEVY and ALBERT LEVY,)
vs.) 60364.
ZAZARUS SCHARFF & ADOLPHUS SCHARFF.)

Now at this day there is filed herein the petition of the defendants for the removal of this cause to the United States circuit court

for the eastern district of Missouri, and the same having been submitted to the court, and the said defendants filing herein a bond in the sum of three hundred dollars with surety, approved by the court, it is thereupon ordered by the court that the clerk of this court certify, according to law, a full and complete transcript of the record and proceedings in this cause to the circuit court of the United States for the eastern district of Missouri.

Which petition and bond are respectively in words and figures as follows, to wit:

Petition for Removal.

In the Circuit Court of the City of St. Louis, State of Missouri.

JAMES LEVY and ALBERT LEVY, Plaintiffs,
vs.
LAZARUS SCHARFF & ADOLPHUS SCHARFF, Defendants. } 60364.

22 Petition for removal to the circuit court of the United States for the eastern district of Missouri.

To the circuit court of the city of St. Louis:

Your petitioners, Lazarus Scharff and Adolphus Sharff, respectfully show to this honorable court that they are the defendants in the above-entitled cause, wherein James Levy and Albert Levy are plaintiffs, and that the matters and amounts in dispute in said suit exceeds, excluding the costs, the sum in value of five hundred dollars ($500).

That the controversy in said suit is between citizens of different States; that your petitioners were, at the time of the commencement of this suit, and still are, citizens of the State of Missouri, resident at the city of St. Louis, and that the plaintiffs, James Levy and Albert Levy, were, at the commencement of this suit, and still are, citizens of the State of Ohio, resident at Cincinnati.

Your petitioners further state that the present term of your honorable court is the term at which said cause could first be tried, and that no trial thereof hath yet been had. Your petitioners offer herewith a bond with good and sufficient surety for entering in said circuit court of the United States, that is to say, the circuit court of the United States in and for the eastern district of Missouri, on the first day of its next session, a copy of the record of this, and for paying all costs that may be awarded to said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners pray this honorable court to proceed no further herein, except to make the order of removal required by law, and accept said surety and bond, and to cause the record herein to be removed into said circuit court of the United States
23 in and for the eastern district of Missouri, and they will ever pray.

NOBLE & ORRICK,
Attorneys for Petitioners.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Adolph Scharff, being duly sworn, on his oath states that he is a member of the firm of L. & A. Scharff, the petitioners in the above petition, and defendants in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof, and that the statements and allegations therein contained are true as he verily believes.

ADOLPH SCHARFF.

Subscribed and sworn to before me, this 9th day of March, A. D. 1883.

[SEAL.] LOUIS R. TATUM,
Notary Public, City of St. Louis, Mo.,
Commission expires July 14, 1886.

Bond.

Know all men by these presents, that we, Adolph Sharff, as principal, and Marcus Bernheim as surety, are held and firmly bound unto James Levy and Albert Levy, partners as James Levy and Brother, in the penal sum of three hundred dollars ($300), to the payment whereof, well and truly to be made unto the said James Levy and Albert Levy, partners as foresaid, their heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents; yet, upon these conditions:

That Lazarus Scharff and Adolph Scharff, partners as L. & A. Scharff, having petitioned the circuit court of the city of St. Louis, State of Missouri, for the removal of a certain cause therein
24 pending, wherein the said James Levy and Albert Levy, as partners as aforesaid, are plaintiffs, and the said Lazarus Scharff and Adolphus Scharff, partners as L. & A. Scharff, are defendants, to the circuit court of the United States in and for the eastern district of Missouri.

Now, if the said Lazarus Scharff and Adolphus Scharff, partners as aforesaid, shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded to said circuit court of the United States, if said court shall hold that the said suit was wrongfully and improperly removed thereto, then this obligation to be void, otherwise in full force and effect.

Witness our hands and seals, this ninth day of March, A. D. 1883.

ADOLPH SCHARFF. [SEAL.]
MARCUS BERNHEIMER. [SEAL.]
JOHN W. NOBLE. [SEAL.]

Approved by the court March 14th, 1883.
Attest: CHAS. F. VOGEL, *Clerk.*

STATE OF MISSOURI, } ss.
City of St. Louis, }

I, Charles F. Vogel, clerk of the circuit court, city of St. Louis, do

hereby certify that the above and foregoing contains a full, true, and complete transcript of the record and proceeding in the cause wherein James Levy and Albert Levy are plaintiffs and Lazarus Scharff and Adolphus Scarff are defendants, as fully as the same remains in my office.

In testimony whereof, I hereto set my hand and affix the seal of said circuit court, at office, in the city of St. Louis, this 29th day of March, A. D. 1883.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

25 Statement of costs accrued:

Clerk Vogel (court costs.)	$10 00
Sheriff Mason	2 15
Att'ys, Dyer, Lee & Ellis	3 00
Total	$15 15

And afterwards, to wit, on the second day of April, 1883, and in said circuit court of the United States, there was filed in said cause a motion to remand the same to the circuit court of the city of St. Louis.

Said motion to remand is in words and figures following, to wit:

Motion to Remand.

In the Circuit Court of the United States for the Eastern District of Missouri.

JAMES LEVY *et al.*, Plaintiffs,

vs.

LAZARUS SCHARFF *et al.*, Defendants.

Now come the plaintiffs in the above entitled cause, and appearing only for the purpose of this motion, do move this court to remand this cause to the circuit court, city of St. Louis, Missouri, because the same was improperly removed from said State court, at the instance of the defendants herein, and because application for such removal was not filed at or before the term of the State court at which this cause could have been first tried.

DYER, LEE & ELLIS,
Attorneys for Plaintiffs.

26 And afterwards, to wit, on the fourth day of May, 1883, at a regular stated term of said court, the following further proceedings were had and appear of record in said cause, to wit:

Order Remanding.

JAMES LEVY *et al.*, Plaintiffs,
vs. } 2186.
LAZARUS SCHARFF *et al.*, Defendants.

Now come the parties, by their attorneys, and the court having considered the plaintiffs motion to remand this cause to the St.

Louis circuit court, and being fully advised in the premises, orders that said motion be sustained, and that this cause be, and the same is hereby, remanded to said St. Louis circuit court.

Writ of Error Allowed.

And thereupon the said defendants present to the court their bill of exceptions, which is allowed, signed, and ordered to be filed as a part of the record herein. And said defendants also present to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said plaintiffs to be and appear at a Supreme Court of the United States at the next term thereof, on the second Monday of October next; which said writ of error is allowed and said citation signed by the judge.

Said bill of exceptions is in words and figures as follows:

Bill of Exceptions.

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *ss:*

In the Circuit Court of the United States in and for said Eastern District.

JAMES LEVY *et al.*, Plaintiffs, *vs.* LAZARUS SCHARFF *et al.*, Defendants. } Civil action. Removed from State court.

27 March Term, A. D. 1883.

Be it remembered, that in the above-entitled cause, at this the March term, A. D. 1883, and on the 2d day of April, 1883, the plaintiffs filed their motion for an order to remand said cause, which said motion being in words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Missouri.

JAMES LEVY *et al.*, Plaintiffs, *vs.* LAZARUS SCHARFF *et al.*, Defendants.

Now come the plaintiffs in the above-entitled cause, and appearing only for the purpose of this motion, do move this court to remand this cause to the circuit court, city of St. Louis, Missouri, because the same was improperly removed from said State court at the instance of the defendants herein, and because application for such removal was not filed at or before the term of the State court at which this cause could have been first tried.

DYER, LEE & ELLIS,
Attorneys for Plaintiffs.

And the said motion, having been argued by counsel, and submitted to the court, and the court, having duly considered the same, afterwards, to wit, on the third day of May A. D. 1883, at said March term, did sustain said motion, and ordered said cause to be remanded to said State court, as appears by said order as

made, and to the action of the court in this behalf in sustaining said motion, and making said order, and to each of said actions of the court, as the same occurred, the defendants, by their counsel, in open court, and at the time, excepted severally; and that said action and exceptions may appear, the defendants pray that
28 this their bill of exceptions may be allowed, and made a part of the record herein, which is accordingly done.

(Signed) SAMUEL TREAT, *Judge.* [SEAL.[

May 4th, 1883.

And afterwards, to wit, on the fifth day of May, 1883, at a regular stated term of said court, the following further proceedings were had and appear of record in said cause, to wit:

Bond Approved.

JAMES LEVY *et al.*, Plaintiffs,
vs. } 2186.
LAZARUS SCHARFF *et al.*, Defendants,

Now comes defendants, by their attorneys, and present to the court their appeal bond herein in the penal sum of five hundred dollars, which is approved and ordered to be filed and made part of the record herein. And thereupon it is ordered that the clerk of this court make up and transmit to the Supreme Court of the United States a full and complete transcript of the record and proceedings herein.

29 Said bond is in words and figures following, to wit:

Appeal Bond.

Know all men by these presents, that we, Lazarus Scharff and Adolph Scharff, are held and firmly bound unto James Levy and Albert Levy in the full and just sum of five hundred dollars, to be paid to the said James Levy and Albert Levy, their heirs, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this fourth day of May, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately, at the March term, 1883, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between James Levy and Albert Levy, plaintiffs, and Lazarus Scharff and A. Scharff, defendants, judgment was rendered against the said defendants on a motion to remand said cause to the circuit court of the city of St. Louis, and the said defendants having obtained a writ of error of the said circuit court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said James Levy and Albert Levy, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first day of June, 1883:

Now the condition of the above obligation is such, that if the said

Lazarus Scharff and A. Scharff shall prosecute said writ to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

LAZARUS SCHARFF. [SEAL.]
ADOLPH SCHARFF. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

30 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 2186, of James Levy and Albert Levy, plaintiffs, against Lazarus Scharff and Adolphus Scharff, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 22nd day of May, in the year of our Lord eighteen hundred and eighty-three.

[SEAL.]

A. P. SELBY,
Clerk of said Court.

31 Endorsed: No. 2186. United States circuit court, eastern district of Missouri. James Levy *et al. against* Lazarus Scharff *et al.* Duly certified transcript in the above entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 879. Lazarus Scharff and A. Scharff, plaintiffs in error, *vs.* James Levy and Albert Levy. Filed 6th June, 1883.